

In re Marquam Investment Corp.

Case No. 383-01488-H07 HLH

12-15-94

Various parties objected to the administrative claims of attorneys Charles Robinowitz and Lawrence Erwin for attorney fees incurred while the case was pending under chapter 11. Charles Robinowitz represented the trustee and a creditor, Brewer, in various matters that arose while the case was pending under chapter 11. Lawrence Erwin represented the debtor while the case was pending under chapter 11.

Mr. Robinowitz sought compensation under §503(b)(4) that allows compensation for attorney fees for an attorney who represents a creditor that makes a substantial contribution as defined in §503(b)(3). The court held that a substantial contribution was made by virtue of all the creditor's and attorney's actions except for an objection to confirmation. The fact that the creditor incurred no otherwise compensable expense under §503(b)(3) was not fatal. The court could not find any specific instance where Mr. Robinowitz's fees were unreasonable. Thus, the court held that Mr. Robinowitz was entitled to an administrative claim for his fees and costs except for those that related to the objection to confirmation.

The court also ruled, alternatively, that Mr. Robinowitz was appointed to represent the trustee under §327(a) for most of the matters for which compensation was sought. The fact that the appointment occurred in an adversary proceeding and that many of the matters were ultimately tried in the main case rather than the adversary proceeding was not fatal. Also, the fact that Mr. Robinowitz represented a creditor was not fatal since the interests of the trustee and creditor were aligned.

As to Mr. Erwin's fees, the court found no specific instance where his fees were unreasonable. While the court did not agree with the legal position taken by Mr. Erwin on one issue that generated fees, the court found that reasonable minds could differ on the point and, in fact, Judge Marsh of the US District Court seemed to agree with Mr. Erwin. There was an objection that Mr. Erwin had participated in a scheme to sell the only estate asset for a deflated price. There was no evidence to support this allegation of improper conduct while there was some evidence to the contrary. In sum, the court found no basis to reduce the fee application.

The court declined to impose sanctions against Mr. Robinowitz since it could find no specific instance of misconduct by Mr. Robinowitz.

Mr. Robinowitz sought sanctions against Warde and Charles Erwin and against Erwin and Erwin, P.C. for filing a false claim. This argument was based on the 9th Circuit's opinion where the court disallowed the claim and sanctioned the claimant for appealing a ruling of the US District Court that reversed the bankruptcy court's ruling that the claim was valid. The court in this case denied the motion to impose sanctions. The court held that there was a legal basis for the filing of the claim (and the taking of the appeal). The court disagreed with the 9th Circuit's ruling on the merits and in imposing sanctions against the claimant. Thus, the court did not impose sanctions as requested by Mr. Robinowitz.

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8 UNITED STATES BANKRUPTCY COURT
9 FOR THE DISTRICT OF OREGON
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Published ☒
Unpublished ☐

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13 Re)
14) Case No. 388-01488-H07
15 MARQUAM INVESTMENT CORP.,)
16) OPINION
17 Debtor.)
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19

20 This matter came before the court upon objections to the
21 claims of Charles Robinowitz and Lawrence Erwin. Charles
22 Robinowitz represents Suzan Brewer, a creditor, and represented the
23 trustee for certain purposes when the case was proceeding under
24 chapter 11. Mr. Lawrence Erwin represents himself as attorney for
25 the debtor while the case was pending under chapter 11. The court
26 will also rule on the various motions for imposition of sanctions.

27 The court will first deal with the objections to the claim of
28 Charles Robinowitz.

29 **1. Claim of Charles Robinowitz**

30 Mr. Robinowitz seeks fees and costs under 2 alternative theories:
31 Section 503 and section 327. These theories will be analyzed.

32 a. Sections 503(b)(1), (3) and (4)

33 Mr. Robinowitz seeks compensation under sections 503(b)(1), (3)
and(4) and sections 327 and 330 of the Code.¹ The debtor, Warde

34 ¹ § 503(b)(1)(A) provides in relevant part: "After
35 notice and a hearing, there shall be allowed
36 administrative expenses, other than claims allowed under
37 section 502(f) of this title, including --(1)(A) the

1 Erwin and Lavelle Mullenex (the objectors) have all raised various
2 objections to Mr. Robinowitz's claim. The objectors argue that

3 actual, necessary costs and expenses of preserving the
4 estate"

5 § 503(b)(3)(D) provides: "After notice and a
6 hearing, there shall be allowed administrative expenses,
7 other than claims allowed under section 502(f) of this
8 title, including -- (3) the actual, necessary expenses,
9 other than compensation and reimbursement specified in
10 paragraph (4) of this subsection incurred by -- (D) a
11 creditor, an indenture trustee, an equity security
12 holder, or a committee representing creditors or equity
13 security holders other than a committee appointed under
14 section 1102 of this title, in making a substantial
15 contribution in a case under chapter 9 or 11 or this
16 title;"

17 §503(b)(4) provides: "After notice and a hearing,
18 there shall be allowed administrative expenses, other
19 than claims allowed under section 502(f) of this title,
20 including -- (4) reasonable compensation for professional
21 services rendered by an attorney or an accountant of an
22 entity whose expense is allowable under paragraph (3) of
23 this subsection, based on the time, the nature, the
24 extent and the value of such services, and the cost of
25 comparable services other than in a case under this
26 title, and reimbursement for actual, necessary expenses
27 incurred by such attorney or accountant;"

28 § 327(a) provides: "Except as otherwise provided in
29 this section, the trustee, with the court's approval, may
30 employ one or more attorneys, accountants, appraisers,
31 auctioneers, or other professional persons, that do not
32 hold or represent an interest adverse to the estate, and
33 that are disinterested persons, to represent or assist
34 the trustee in carrying out the trustee's duties under
35 this title."

36 § 330(a) provides: "After notice to any parties in
37 interest and to the United States trustee and a hearing,
38 and subject to sections 326, 328, and 329 of this title,
39 the court may award to a trustee, to an examiner, to a
40 professional person employed under section 327 or 1103 of
41 this title, or to the debtors attorney -- (1) reasonable
42 compensation for actual, necessary services rendered by
43 such trustee, examiner, professional person, or attorney,
44 as the case may be, and by any paraprofessional persons
45 employed by such trustee, professional person, or
46 attorney, as the case may be, based on the nature, the
47 extent, and the value of such services, the time spent on
48 such services, and the cost of comparable services other
49 than in a case under this title; and (2) reimbursement
50 for actual, necessary expenses."

1 section 503(b)(3) requires a creditor to incur an expense other
2 than an attorney fee or expense covered under 503(b)(4) in
3 connection with making a substantial contribution to the estate or
4 in recovering a transfer. The objectors assert that Mr.
5 Robinowitz's client, Suzan Brewer, did not incur any such expense
6 and that Ms. Brewer has not proven that she incurred any expense
7 other than an expense of the kind described in section 503(b)(4).
8 Thus, according to the objectors, none of Mr. Robinowitz's fees can
9 be recovered from the estate under section 503(b)(4).

10 One reading of sections 503(b)(3) and (4) supports the
11 objectors' position. Section 503(b)(3) refers to a creditor who
12 incurred an expense other than an expense of the kind referred to
13 in section 503(b)(4) in connection with making a substantial
14 contribution to the estate. The objectors assert that before
15 attorney fees can be awarded under section 503(b)(4) to the
16 attorney who acted on behalf of a creditor, it must appear that an
17 expense allowable under section 503(b)(3) was incurred by the
18 creditor. All of Mr. Robinowitz's fees and all of the expenses
19 detailed in his applications are covered by section 503(b)(4).
20 Thus, under the objectors' reading of sections 503(b)(3) and (4),
21 whether or not Ms. Brewer's and Mr. Robinowitz's efforts have made
22 a "substantial contribution," Mr. Robinowitz's fees and expenses
23 could not be allowed under section 503(b)(4) because Ms. Brewer
24 had no expenses allowable under section 503(b)(3).

25 The court does not agree with this reading of sections
26 503(b)(3) and (4). Rather, the court believes that section
27 503(b)(4)'s reference to "an entity whose expense is allowable

1 under paragraph (3) of this subsection" is merely intended to
2 identify the entity in question and not to limit compensation only
3 to those professionals who rendered services to an entity which
4 actually incurred an expense. One problem with the objectors'
5 reading of these statutes is that an entity/creditor would only
6 need to incur a nominal expense such as the cost of a stamp, for
7 example, to be entitled to have all its related attorneys fees and
8 expenses compensated. Also, the objectors' reading of the statute
9 would allow compensation where the creditor and its attorney's
10 retainer agreement required the creditor to pay all litigation
11 costs as they were incurred but would disallow compensation where
12 the attorney advanced the costs with the understanding that he
13 would be reimbursed by the creditor. Such an arbitrary and
14 illogical reading of the statute is not necessary. The court
15 concludes that even if Ms. Brewer may not have directly incurred
16 any costs, section 503(b)(3) does not preclude an award under
17 section 503(b)(4) in this case. The court must now decide whether
18 Ms. Brewer has made a "substantial contribution" to this case.

19 i. Claims litigation

20 The court believes that the successful litigation by Mr.
21 Robinowitz on behalf of Ms. Brewer (and the trustee) pursuing
22 objections to claims constitutes a significant contribution to the
23 estate under section 503(b)(3). This litigation reduced the claims
24 against the estate by disallowing invalid claims and increased the
25 estate's "net worth" permitting a larger distribution to creditors
26 holding allowed claims. The fees for successful claims objections
27 are described as follows:

1 A. Erwin and Erwin, P.C. claim

2 Mr. Robinowitz seeks \$48,190 in attorney fees for objecting to
3 this claim. Mr. Robinowitz's efforts eliminated a \$120,000 claim
4 by Erwin and Erwin, P.C. against the debtor's estate.

5 B. Lavelle Mullenex wage claim

6 Mr. Robinowitz seeks an award of \$75 for successfully
7 objecting to the \$27,900 pre petition wage claim of Lavelle
8 Mullenex.

9 C. Lavelle Mullenex and Warde Erwin's indemnity claims

10 Mr. Robinowitz seeks \$7,400 for successfully defeating these
11 claims totalling \$29,435.

12 D. A portion of Lawrence Erwin's pre-petition claim

13 Mr. Robinowitz seeks \$4,500 for successfully reducing this
14 claim from \$9,269.18 to \$4,000.

15 E. Other claims

16 Mr. Robinowitz requests \$2,500 for litigating, in the
17 adversary proceeding, on behalf of the trustee the following:

18 1. The right to interest on loan claims by Warde Erwin and Lavelle
19 Mullenex;

20 2. A claim for subordination of the Erwin and Erwin claim;

21 3. The debtor's indemnification claims against Warde Erwin and
22 Lavelle Mullenex;

23 4. A claim for unpaid rent by the corporation against Erwin and
24 Erwin, P.C.

25 All of these matters were pursued as a part of the adversary
26 proceeding. Issues number 2 and 3 became moot when the claim of
27 Erwin and Erwin, P.C. was ultimately disallowed while number 4 was

1 moot when the lease was avoided. Mr. Robinowitz was unsuccessful
2 on issue number 1. Although some of these issues ultimately became
3 moot, the court believes they are compensable under the "business
4 judgment" rule discussed below with respect to section 327.

5 ii. Lease avoidance action

6 The successful effort to set aside a lease agreement was also
7 a significant contribution to the estate and the fees and costs
8 therefore should be compensated. The work performed by Mr.
9 Robinowitz in setting aside the lease was specifically authorized
10 under section 327 and the fees therefor will be allowed thereunder
11 as discussed below. It may be useful to note, however, that the
12 court believes this work resulted in a significant contribution and
13 would be compensable under sections 503(b)(3) and (4) if sections
14 327 and 330 were not available. Thus, the costs and fees related
15 to this work, including the costs of any experts employed to
16 further this action but whose employment was not approved in
17 advance under section 327, are compensable under section 503(b)(4).

18 iii. Objection to confirmation

19 Mr. Robinowitz also seeks fees and costs for objecting to
20 confirmation of the chapter 11 plan. This action was not within
21 the scope of his employment by the trustee as discussed below and
22 therefore cannot be compensated under sections 327 and 330. While
23 this effort was successful, the court believes it did not result in
24 a significant contribution to the estate as required by sections
25 503(b)(3) and (4). The debtor's plan was to sell the property and
26 pay creditors. After the objection to confirmation of that plan
27 was successful, the case was converted to one under chapter 7 and

1 the property was sold and creditors will be paid. It seems that
2 the objection and subsequent conversion only delayed the sale. Mr.
3 Robinowitz's arguments that the sale contemplated by the debtor
4 under the plan was part of a plot to defraud creditors is not
5 persuasive as discussed below. Therefore, the fees of \$750 and
6 costs related to the objection to confirmation will not be allowed.
7 iv. Fees related to "frivolous" appeal to 9th Circuit

8 These fees will not be allowed for the reasons discussed below
9 under the same heading.

10 b. Sections 327 and 330

11 As an alternative basis for allowance of his fees, Mr.
12 Robinowitz argues that much of his work was done pursuant to an
13 order of the court appointing him to represent the trustee. Thus,
14 he argues, pursuant to sections 327 and 330 of the Code, he is
15 entitled to reasonable compensation for such work. In the event
16 the court's ruling on section 503(b)(3) and (4) is upset on appeal,
17 it will be useful to analyze this alternative theory of recovery.

18 i. Claims litigation - The objectors point out that the order
19 appointing Mr. Robinowitz to represent the trustee arose in an
20 adversary proceeding that ultimately dealt with the avoidance of an
21 alleged fraudulent conveyance. The bulk of Mr. Robinowitz's fees
22 were incurred in defeating the claims of Erwin and Erwin, P.C. and
23 others. The claims litigation occurred in the main case in the
24 normal claims-objection process. Since Mr. Robinowitz was only
25 appointed to represent the trustee in the adversary proceeding, the
26 objectors argue that Mr. Robinowitz is not entitled to any fees for
27 objecting to claims in the main case.

1 The problem with the objectors' argument is that it ignores
2 the scope of the adversary proceeding at the time the order
3 appointing Mr. Robinowitz was entered. The complaint in the
4 adversary proceeding was filed on April 3, 1985 by the trustee's
5 attorney at that time, Mr. John Durkheimer. The original complaint
6 included, in count I of the first claim for relief, objections to
7 the claims of Erwin, Lamb and Erwin, P.C. (now known as Erwin and
8 Erwin, P.C.), Warde Erwin, Lavelle Mullenex and Lawrence Erwin.

9 On June 13, 1985, the court entered an order allowing Mr.
10 Durkheimer to withdraw and appointing Mr. Robinowitz to represent
11 the trustee in the adversary proceeding. At that time, the
12 complaint included the objections to the claims mentioned above.

13 Later, on June 24, 1985, Mr. Robinowitz filed an amended
14 complaint on behalf of the trustee. The amended complaint
15 continued the effort to disallow the claims mentioned above. On
16 December 18, 1985 a second amended complaint was filed by Mr.
17 Robinowitz on behalf of the trustee. This complaint was filed
18 without leave of court and continued the previously asserted
19 objections to claims except that it did not seek disallowance of
20 the pre petition claim of Mr. Lawrence Erwin.

21 On January 10, 1986, the court entered an order allowing the
22 filing of the second amended complaint with certain exceptions.
23 The order of January 10, 1986 was in the nature of an order
24 striking certain parts of the second amended complaint. In
25 relevant part, the stricken portions of the complaint dealt with
26 the language therein seeking disallowance of claims. The court's
27 order striking these portions of the complaint was appropriate

1 since objections to claims are contested matters rather than
2 adversary proceedings. See FRBP 9014 and 7001.

3 At the time the order to strike various parts of the complaint
4 was entered, however, it was not the court's intention to alter in
5 any way the scope of Mr. Robinowitz's appointment. The court was
6 fully aware that Mr. Robinowitz was continuing to pursue the claims
7 litigation on behalf of the trustee. If anyone had thought it
8 necessary to seek another order appointing Mr. Robinowitz to
9 represent the trustee for this purpose, the court would have
10 entered such an order.

11 The reclassification of a matter as a contested matter rather
12 than an adversary proceeding does not control the outcome in this
13 issue. The purpose of section 327's requirements is to avoid
14 "volunteerism" and to allow the court to control the administrative
15 expenses in a case. See Collier on Bankruptcy 15th Ed., p. 327-12
16 at ¶327.02. These purposes were fully met in this case. Mr.
17 Robinowitz sought and obtained a court order authorizing his
18 employment for the purposes described in the complaint. This is
19 sufficient. It would be highly inequitable to deny Mr. Robinowitz
20 compensation for this work because the court later entered a
21 "housekeeping" order that re-characterized certain issues as
22 contested matters rather than an adversary proceedings but which
23 had no substantive impact on the issues presented.

24 Thus, the court concludes that Mr. Robinowitz is entitled to
25 compensation under sections 327 and 330, as well as sections
26 503(b)(3) and (4), for all the work he performed within the scope
27 of his employment as defined by the complaint that existed as of

1 the date of his employment. These issues include the avoidance of
2 the lease between Erwin and Erwin, P.C. and the debtor and the
3 objections to the claims of Erwin and Erwin, P.C., Warde Erwin and
4 Lavelle Mullenex. Since objections to the pre petition claim of
5 Lawrence Erwin were stricken from the second amended complaint,
6 such work should not be compensated under sections 327 and 330
7 (although it is compensable under section 503(b)(4) as discussed
8 above).

9 Next, the objectors argue that Mr. Robinowitz was not
10 "disinterested" as required by section 327 and should therefore not
11 be entitled to compensation. The basis for this argument is that
12 Mr. Robinowitz represents a creditor of the estate and is therefore
13 disqualified from representing the trustee. The court disagrees.
14 The limited scope of Mr. Robinowitz's employment by the trustee
15 resolves this issue. Mr. Robinowitz represented the trustee in all
16 matters that were raised in the adversary proceeding. As just
17 discussed, those matters only involved objecting to the claims of
18 other creditors and avoiding a transfer. None of these matters
19 involves any conflict. Ms. Brewer's interest was in seeing that
20 invalid claims were disallowed and that estate assets were
21 maximized. This is exactly what the trustee was seeking to do and
22 was the reason the court authorized Mr. Robinowitz's employment in
23 the first place.

24 The fact that Mr. Robinowitz was authorized to pursue claims
25 litigation and the lease avoidance action did not insulate Ms.
26 Brewer's claim from attack by the trustee or others. Given the
27 nature of Mr. Robinowitz's employment, there simply was no

1 disqualifying interest as contemplated in section 327.

2 The objectors have not objected to any specific item in the
3 work identified as relating to the objections to the claims
4 described above. The court is not aware of any irregularities in
5 this regard and would, if section 503 were unavailing, therefore
6 allow under section 327 the entire request except for the fees and
7 costs related to the objection to the pre petition claim of
8 Lawrence Erwin.

9 ii. Lease avoidance litigation - The objectors note that Mr.
10 Robinowitz seeks an award of \$10,000 in fees for litigating the
11 fraudulent conveyance action, the net effect of which action,
12 according to the objectors, was to bring \$8,000 into the estate.
13 This, they argue, is inappropriate.

14 The court does not agree. At the time this issue was raised,
15 there were concerns by the trustee that the existence of a lease at
16 less than the market rate would be an impediment to sale of the
17 property at a fair price. The extent of this potential impediment
18 was difficult to calculate.

19 Also, at the outset, the trustee's contention was that the
20 lease was far below market and it was possible that the action
21 would result in a much greater return to the estate. The fact that
22 the matter was ultimately settled for \$8,000 does not answer the
23 question. If all such litigation were judged with the benefit of
24 hindsight, attorneys might be very reluctant to pursue litigation
25 on behalf of the estate. While some dubious litigation would be
26 prevented, a great deal of meritorious claims might be lost. The
27 court does not wish to place this kind of impediment on trustees

1 and attorneys in making a determination of the reasonableness of
2 fees.

3 Rather, it seems appropriate to adopt a "business judgment"
4 rule and ask whether the trustee's decision to pursue the
5 litigation was within the scope of reasonable business judgment.
6 The court believes it was reasonable to pursue the litigation given
7 the factors discussed above and will not reduce the fee request on
8 the ground that the recovery was too small compared to the fee.
9 Thus, it appears that Mr. Robinowitz is entitled to fees of \$10,000
10 for the work in the adversary proceeding.

11 iii. Fees related to "frivolous" appeal to 9th Circuit

12 Finally, with respect to attorney fees and costs, Mr.
13 Robinowitz seeks an award of \$5058.75 in fees from the estate for
14 successfully defending a so-called frivolous appeal by Erwin and
15 Erwin, P.C. to the 9th Circuit Court of Appeals. The 9th Circuit
16 imposed sanctions against the law firm of Erwin and Erwin, P.C. in
17 the amount of \$5058.75 for pursuing the appeal and this is the
18 amount Mr. Robinowitz now seeks. This request is not appropriate.
19 The attorney fee award in favor of Brewer was imposed against a
20 creditor of this estate for pursuing an appeal. The debtor was not
21 responsible for the taking of the appeal. It is not appropriate
22 for the estate to pay for the actions of a creditor. Any such
23 satisfaction should come from the assets of the party against whom
24 the sanction was imposed and not from the assets of the debtor's
25 estate.

26 iv. Costs

27 The remaining issue is the appropriate award of costs and

1 expenses relating to the compensable items. The only non
2 compensable [under both sections 503(b)(4) and 327] work by Mr.
3 Robinowitz was \$750 for objecting to confirmation. Any costs
4 related to this work would also be non-compensable. The
5 application itemizing the expenses, however, does not indicate
6 which expenses relate to which services. Since Mr. Robinowitz's
7 position was that he was entitled to fees and costs for all work,
8 it was not necessary for him to make an effort at delineating these
9 costs at the time he prepared and filed the application. Thus, the
10 court will enter an order granting Mr. Robinowitz time to file an
11 itemization which identifies which costs relate to the objection to
12 confirmation. If he fails to file such an itemization, the costs
13 will be disallowed in full.

14 **2. Post Petition Claim of Lawrence Erwin as attorney for debtor**

15 On March 25, 1988 the court entered an interim order allowing
16 Lawrence Erwin \$4,000 in administrative fees and \$495.50 in
17 administrative expenses. Lawrence Erwin later filed an application
18 for compensation in the amount of \$15,991.08 for services as the
19 debtor's attorney in the chapter 11 case. The application includes
20 the \$4,000 previously awarded, seeks an additional \$3,953.94 for
21 fees related to an appeal of an award of fees to Mr. Robinowitz,
22 and \$7,541.64 for services performed after the \$4,000 award on
23 March 25, 1988.

24 Mr. Robinowitz objects to the fee application as follows:

25 a. \$4,000 prior award

26 Mr. Robinowitz argues that the bankruptcy was a sham and part
27 of a scheme to prevent Ms. Brewer from collecting. Finally Mr.

1 Robinowitz argues that: "This court, as a court of equity, should
2 reconsider the \$4,000 it originally allowed to Lawrence W. Erwin
3 and set it aside." Objection to Application for Compensation by
4 Lawrence W. Erwin, docketed June 9, 1993, p. 3. The court's prior
5 order is now res judicata and cannot now be set aside except under
6 FRBP 9024. This court finds no legal basis in the objection upon
7 which to set aside the prior order.

8 b. \$3,953.94 for Appeal of Robinowitz Fee

9 Mr. Robinowitz argues that the appeal of this court's interim
10 award to Mr. Robinowitz under section 503(b)(3) and (4) was of no
11 benefit to the estate. Even though the appeal resulted in the
12 reversal of this court's fee award, Mr. Robinowitz points out that
13 the fee award to Mr. Robinowitz was disallowed with leave to him to
14 reapply. Since Mr. Robinowitz has reapplied for fees, he argues
15 the appeal accomplished nothing and Mr. Lawrence Erwin's work
16 therein should not be compensated.

17 The bases for the appeal by the debtor of this court's order
18 allowing Mr. Robinowitz's fees was that Mr. Robinowitz was not
19 entitled to fees since he is not disinterested as required by
20 sections 327 and 328 and that he was not entitled to fees under
21 section 503(b)(3) and (4) as discussed above. Although this court
22 disagrees with the debtor's position, this court's order was
23 reversed by Judge Marsh of the U.S. District Court. Judge Marsh's
24 judgment in USDC Civil No. 88-816-MA dated October 14, 1988 reads,
25 in full, as follows:

26 "IT IS ORDERED AND ADJUDGED Judge Hess's order
27 allowing administrative expenses is REVERSED.
28 Deft [sic probably "Defendant" is intended]

1 has leave to resubmit administrative expenses
2 to Hudge [sic "Judge" intended] Hess under the
3 correct statutory provision."

4 The basis for the reversal is not at all clear since Judge Marsh
5 did not enter an opinion explaining his ruling. Although the court
6 does not agree with the debtor's position or Judge Marsh's ruling
7 on this issue, it does not necessarily follow that the debtor's
8 position was without merit. Apparently Judge Marsh found some
9 merit in the argument and this court understands that sections
10 503(b)(3) and (4) could be read in the manner proposed by the
11 debtor. Thus, the court can see no reason to disallow the fees for
12 such work.

13 c. \$7,541.64 fees incurred since 3-25-88 award

14 Mr. Robinowitz argues that these services were actually
15 performed for the benefit of Warde Erwin and Charles Erwin and not
16 the estate. Since the debtor did not ultimately reorganize in
17 chapter 11 and the case was eventually converted to chapter 7, Mr.
18 Robinowitz concludes that all of Mr. Lawrence Erwin's services were
19 of no benefit to the estate.

20 The problem with this argument is that Mr. Robinowitz failed
21 to point to any item in Mr. Lawrence Erwin's application that was
22 inappropriate. With one exception that will be discussed next,
23 none of Mr. Lawrence Erwin's work was identified as being work that
24 was performed for the benefit of someone other than the debtor.
25 The court cannot simply assume this allegation is true without some
26 evidence to support the allegation.

27 Apparently Mr. Robinowitz believes that the fact that Mr.
28 Lawrence Erwin is related to one of the debtor's shareholders, Mr.

1 Warde Erwin, and is related to both principals of Erwin and Erwin,
2 P.C., is sufficient for the court to conclude that all of Mr.
3 Lawrence Erwin's legal efforts as counsel for the debtor were not
4 performed with the debtor's best interests in mind. Mr.
5 Robinowitz, however, failed to offer any credible evidence to
6 support this position. The only effort to specify work that was
7 performed by Mr. Lawrence Erwin that was not intended to benefit
8 the debtor was Mr. Robinowitz's testimony that Mr. Lawrence Erwin
9 attempted to arrange a sale of the corporate realty for less than
10 market value to an individual whom Mr. Robinowitz suspected might
11 be a straw man acting for the Erwins. This testimony was refuted
12 by testimony from Mr. Lawrence Erwin and Mr. Charles Erwin. Mr.
13 Lawrence Erwin testified that his legal efforts in regard to the
14 offer to purchase were simply routine efforts to entertain,
15 consider and disseminate information about the offer.

16 Mr. Robinowitz offered nothing further at the hearing with
17 respect to this specific allegation of collusion and nothing
18 further on his general assertion that Mr. Lawrence Erwin's work was
19 intended to benefit his relatives at the expense of the debtor. It
20 would have been very significant if Mr. Robinowitz had produced the
21 alleged straw man to testify or some evidence of his identity and
22 relationship with the Erwins. This did not occur, however, and the
23 complete lack of credible evidence on this point strongly suggests
24 that Mr. Robinowitz's suspicions were unfounded. Certainly, such
25 suspicions do not come anywhere near establishing that Mr. Lawrence
26 Erwin and others conspired to defraud the court and creditors in
27 the manner alleged by Mr. Robinowitz.

1 While it is true that the case ultimately was converted to one
2 under chapter 7 where the sole asset was sold, this was what the
3 debtor's plan of reorganization called for. It therefore seems
4 incorrect to conclude that none of Mr. Lawrence Erwin's services in
5 attempting to achieve this goal should be compensated.

6 In sum, Mr. Robinowitz did not point to any single service
7 performed by Mr. Lawrence Erwin and charged to the debtor that was
8 inappropriate and the court must therefore approve his fee
9 application as attorney for the debtor.

10 **3. Sanctions**

11 Mr. Warde Erwin has suggested that sanctions be imposed
12 against Mr. Robinowitz for signing various pleadings in violation
13 of FRBP 9011. Mr. Robinowitz has requested that sanctions be
14 imposed against Erwin and Erwin, P.C., Mr. Warde Erwin and Mr.
15 Charles Erwin for signing and asserting a fraudulent claim.

16 a. Sanctions against Mr. Robinowitz

17 This court has not always ruled in favor of Mr. Robinowitz's
18 positions in this case. On the other hand, Mr. Robinowitz has been
19 successful in appealing some of this court's rulings. Given the
20 incredibly long and tortured path of the litigation between these
21 parties, it is extremely difficult for this court to review all the
22 actions of the parties over the past 11 and 1/2 years in this case
23 and conclude that Mr. Robinowitz acted so improperly as to warrant
24 imposing sanctions. The court declines to do so and will not
25 impose sanctions against Mr. Robinowitz.

26 b. Sanctions against Mr. Warde Erwin

27 Mr. Robinowitz alleges that Mr. Warde Erwin filed a fraudulent

1 proof of claim in this case when he signed and filed a \$120,000
2 claim on behalf of Erwin and Erwin, P.C. The claim was based on
3 legal services performed by the law firm of Erwin and Erwin, P.C.
4 for the debtor, Marquam Investment Corporation. This claim was
5 ultimately disallowed by the 9th Circuit Court of Appeals in part
6 on the ground that this court erroneously concluded that the debtor
7 had entered into an express contract with the law firm to pay for
8 the legal services based solely on implausible testimony from
9 Charles Erwin. The 9th Circuit's ruling forms the basis for Mr.
10 Robinowitz's assertion that the claim was fraudulent.

11 This court has great difficulty with this argument. When the
12 trustee's objection to this claim was litigated, this author was
13 the presiding judge. After a trial, this author ruled from the
14 bench that the claim was valid. The factual basis for this ruling
15 was that:

- 16 1. The law firm's members performed valuable legal services for
17 the debtor corporation; and
- 18 2. The law firm intended to be paid for these services; and
- 19 3. The fact that these services were being performed with the
20 intent to be paid therefor was known to the corporate officers and
21 the benefits thereof were accepted by the corporation without
22 objection.

23 Based on these findings by this author, the author applied a
24 doctrine which he learned as a first year law student called
25 "quasi-contract" sometimes also known as a "contract implied at
26 law" or "quantum meruit." The classic example of this doctrine is
27 the case of the paper boy who mistakenly delivers a newspaper to a

1 non-subscriber's home every day for a month. The non-subscriber
2 accepts and reads the paper every day knowing of the mistake but
3 says nothing. When the paper boy comes by at the end of the month
4 to collect for the paper, the law will not allow the non-subscriber
5 to avoid payment. Although there is no express contract, oral or
6 written, between the paper boy and the non-subscriber, the law will
7 imply one. In such a situation, the non-subscriber is liable for
8 the reasonable value of the goods or services received.

9 This was the legal basis for this court's ruling allowing the
10 claim of Erwin and Erwin, P.C. On appeal to the U.S. District
11 Court, the court reversed this court's order allowing the claim.
12 Then, the party who had won at the trial court, the claimant,
13 appealed the matter to the 9th Circuit Court of Appeals in an
14 effort to reinstate this court's ruling. At the 9th Circuit, the
15 court affirmed the US District Court's ruling. In addition,
16 however, the authors of the opinion by the 9th Circuit Court of
17 Appeals misinterpreted this court's basis for its ruling. In its
18 opinion, the panel wrote, in relevant parts:

19
20 [O]ur independent review of the record before
21 the bankruptcy court has convinced us that the
22 bankruptcy court clearly erred in finding that
23 Marquam agreed to pay the Erwin law firm for
24 any legal services." In re Marquam Investment
25 Corp., 942 F.2d 1462, 1463 (9th Cir. 1991).

26
27 "The bankruptcy court did not expressly place
28 the burden on the Erwin law firm to prove that
29 it entered into an agreement in good faith
30 with Marquam for legal services." Id. at
31 1465-66.

32
33 "No evidence was presented of any corporate
34 minutes reflecting the decision to enter into
35 an agreement with the Erwin law firm for legal

1 services." Id. at 1466.

2
3 "[T]he bankruptcy court was mistaken in
4 finding that the Marquam Investment
5 Corporation entered into a contract to pay the
6 Erwin law firm for its legal services." Id.
7 at 1463.

8
9 "The bankruptcy court's reasoning can be
10 summarized as follows:

11 A lawyer is entitled to payment for legal
12 services performed pursuant to an agreement
13 with a bankruptcy corporation.

14 Charles Erwin did not intend to donate
15 his legal services to the Marquam Investment
16 Corporation.

17 Therefore, the Marquam Investment
18 Corporation promised to pay Charles Erwin for
19 his services.

20 This flawed syllogism not only defies
21 elementary precepts of logic, it violates
22 fundamental principles of contract law that
23 require mutuality of assent, and ignores the
24 burden placed upon an insider to prove that
25 the debt resulted from an arm's length
26 transaction that can withstand rigorous
27 scrutiny." Id. at 1466.

28
29 "Time slips were attached to the Erwin law
30 firm's amended claim filed in 1986." Id. at
31 1463.

32 These quotes demonstrate that the 9th Circuit panel
33 misunderstood the syllogism relied upon by this author in making
34 the ruling in question and the legal basis therefore. Also, while
35 the 9th Circuit's opinion correctly recites that time slips were
36 kept by Charles Erwin, this fact is never again alluded to in the
37 opinion yet was an important basis for this court's finding that
38 Mr. Charles Erwin did not intend to donate his services. This
39 court felt it persuasive evidence of intent to be paid for the
40 services that the attorney kept time records of his services.

41 The authors of the 9th Circuit's opinion were also apparently
42 unaware of the fundamental legal concept of "quasi-contract" as

discussed above so as to correctly interpret and reiterate this court's orally stated syllogism. Had the authors been familiar with the concept, they might not have misinterpreted the basis for this court's ruling.²

² Even if the 9th Circuit panel had understood the legal basis for this court's ruling, it does not necessarily follow that it would have affirmed this court's ruling. The 9th Circuit panel reversed this court's factual finding that Charles Erwin did not intend to donate his services. The panel held that this finding was "clearly erroneous."

In reaching the conclusion that Charles Erwin did not intend to donate his services, this court relied upon the following:

1. Mr. Charles Erwin's testimony that he did not intend to donate \$120,000 of his time;
2. Mr. Charles Erwin was not a shareholder in the corporation for whose benefit the services were performed;
3. Mr. Charles Erwin's uncontested testimony that he was a new lawyer who had a family to support and could not afford to donate this amount of time;
4. There was a non-insider member of the law firm, a Mr. Lamb, who would not benefit from the donation of the services;
5. Mr. Charles Erwin kept time records for all his services.

Apparently, the 9th Circuit panel felt that these facts did not meet the heightened burden of proof imposed upon the claimant by virtue of Mr. Erwin's "insider" status. Id. at 1465.

As discussed in the body of this opinion, the law of implied contracts requires that the person performing the services intends to be paid for them. Given the panel's factual determination that Mr. Erwin intended to donate his services, there would be no basis upon which to imply a contract.

Although the panel might have reversed this court's ruling even if it had understood the legal basis therefor, it seems unlikely that it would have found the appeal frivolous. Since there was substantial evidence to support the contention that the law firm's members intended to be paid, and since the law allows recovery under such circumstances, it was not improper for the law firm to pursue collection of the claim against the estate. Further, given that this court ruled in favor of the law firm, it seems completely reasonable for the law firm to attempt to reinstate the trial court ruling on

1 On the basis of its finding that the claim was not valid, the
2 9th Circuit Court of Appeals imposed sanctions against the
3 appellant for what it considered a frivolous appeal.³ Brewer v.
4 Erwin and Erwin, P.C., 959 F. 2d 800 (9th Cir. 1992).

5 Given this background, this court cannot conclude that the
6 claim was fraudulent as asserted by Mr. Robinowitz. It is possible
7 that an appellate court could find this court's prior findings of
8 fact on this issue to be clearly erroneous and reverse the court
9 again with respect to this motion for sanctions. Given the
10 misinterpretations and misunderstandings by the 9th Circuit panel
11 of this court's reasoning and actions in this matter, however, it
12 seems entirely inappropriate to again impose sanctions. This time,
13 if this issue is appealed and the basis for this court's earlier
14 ruling is understood, an appellate court may recognize that there
15 was evidence to support the claimant's position and find that the
16 position was not frivolous. Obviously, this court did not and does
17 not find it to have been a frivolously or fraudulently filed claim.

18 In sum, the court will not impose sanctions against Mr. Warde
19 Erwin as requested by Mr. Robinowitz.

20 c. Sanctions against Erwin and Erwin, P.C.

21 For the reasons just described, the court will not impose

22 appeal. Thus, the panel's imposition of sanctions
23 against the law firm was inappropriate and it would
24 compound the error and injustice for this court to again
25 impose sanctions against the claimant for filing a claim
26 in this case.

27 ³ This may be the first time a party who prevailed in
28 the trial court has been sanctioned for attempting to
29 reinstate the trial court's judgment on appeal.

1 sanctions against Erwin and Erwin, P.C.

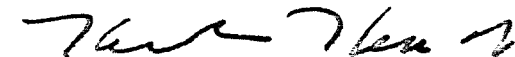
2 d. Sanctions against Mr. Charles Erwin

3 In addition to the reasons just given, the court will not
4 impose sanctions against Mr. Charles Erwin for filing a fraudulent
5 claim since he did not sign the claim. Federal Rule of Bankruptcy
6 Procedure 9011 requires that a pleading be signed by an individual
7 before the court can impose sanctions against the individual. The
8 claim in question was signed only by Mr. Warde Erwin.

9 SUMMARY

10 In conclusion, the claim of Charles Robinowitz will be allowed
11 in the amount of \$72,665 representing his allowed attorney fees.
12 The allowable costs for Mr. Robinowitz cannot be determined at this
13 time. The administrative claim of Mr. Lawrence Erwin will be
14 allowed in the amount of \$11,495.58 in addition to the prior \$4,000
15 award which will not be set aside. The motions for sanctions will
16 all be denied. The court will enter an appropriate order.

17 DATED this 15th day of December, 1989.

18 
19 _____
20 Henry L. Hess, Jr.
21 Bankruptcy Judge
22
23

24 cc: Charles Robinowitz
25 Lawrence Erwin